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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ROBERT EARL WILLIS, JR., Defendant and Appellant.	G051940 (Super. Ct. No. 10NF2940) O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County, Thomas A. Glazier, Judge. Affirmed.

Siri Shetty, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Karl T. Terp, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

Defendant Robert Earl Willis, Jr., sought redesignation of his felony conviction for violating Penal Code section 484e, subdivision (b) (acquiring multiple access cards under certain conditions), as a misdemeanor. (All further statutory references are to the Penal Code, unless otherwise noted.) The trial court denied his request, and defendant appeals.

We affirm. Section 484e is not listed as one of the felony convictions for which redesignation and resentencing may be sought. Further, the language of section 484e does not permit an interpretation that would allow a violation of that section to be redesignated as a misdemeanor. Finally, because the burden is on the defendant to prove his or her entitlement to redesignation, and because defendant here admits that there is no proof that the value of the access cards he obtained was less than $950, his request would fail on that ground as well.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Defendant was charged in an information with two counts of second degree robbery (§§ 211, 212.5) (counts 1 and 3), one count of first degree residential burglary (§§ 459, 460) (count 2), one count of acquiring multiple access cards (§ 484e, subd. (b)) (count 4), one count of unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a)) (count 5), and four counts of identity theft (§ 530.5, subd. (c)(1)) (counts 6 through 9). The information alleged as a sentencing enhancement that defendant had been previously convicted of unlawful taking of a vehicle, and also alleged he had served four prior prison terms. Defendant pled guilty to all charges, and admitted the sentencing enhancement and prior prison term allegations.

Defendant's guilty plea included the following allocution: "In Orange County, California, I did the following unlawfully and willfully: On 9/10/10 I used force and fear to take the personal property of Lane C. from his person and permanently

deprive Lane C. of that property, I also entered an inhabited dwelling house, that was inhabited by Lane C[.], to commit larceny. On 9/15/10 I used force and fear to take the personal property of Leroy M. from his person[.] I did the acts on 9/10/10 and 9/15/10 with Crystal Duncan. Also on 9/22/10 I unlawfully acquired access cards issued to 4 other persons. Also on 9/22/10 I did steal a motor vehicle, namely an Acura car with the intent to deprive the owner of the vehicle permanently. Also, on 9/22/10, I was in possession of personal Identifying information of Gwen X., Nick R[.], Phyllis R., Edith X., and I got this information unlawfully."

The court sentenced defendant to six years in prison: two years on count 1, and four one-year terms for the prison priors. Concurrent terms were imposed on counts 2 through 5, and imposition of sentence was suspended on counts 6 through 9.

In January 2015, defendant filed a petition to recall his sentence on count 4, acquiring access cards, pursuant to section 1170.18, subdivision (a).[1] The trial court denied defendant's petition, and this appeal followed.

DISCUSSION

In 2014, the voters enacted Proposition 47, the Safe Neighborhoods and Schools Act (§ 1170.18), which makes certain drug- and theft-related offenses misdemeanors, unless those offenses were committed by certain ineligible defendants. (*People v. Rivera* (2015) 233 Cal.App.4th 1085, 1089, 1091.) Those offenses previously had been designated as felonies or as crimes that can be punished as either felonies or misdemeanors. (*Id.* at p. 1091.)

Section 490.2, subdivision (a), which was added by Proposition 47, provides: "Notwithstanding Section 487 or any other provision of law defining grand

[1] Defendant's petition also requested resentencing on the charge of unlawful taking of a vehicle. At the hearing on the petition, defendant withdrew his argument as to that charge.

theft, obtaining any property by theft where the value of the money, labor, real or personal property taken does not exceed nine hundred fifty dollars ($950) shall be considered petty theft and shall be punished as a misdemeanor . . . ."

Defendant was convicted under section 484e, subdivision (b), which is one of the statutes defining "theft" in the context of access card offenses. (See §§ 484d-484j.) Section 484e, subdivision (b) provides: "Every person, other than the issuer, who within any consecutive 12-month period, acquires access cards issued in the names of four or more persons which he or she has reason to know were taken or retained under circumstances which constitute a violation of subdivision (a), (c), or (d) is guilty of grand theft."[2] Defendant claims that section 490.2, subdivision (a) overrides all prior definitions of grand theft, and requires that any theft where the value of the property does not exceed $950 must be deemed to be misdemeanor petty theft. The Attorney General responds that section 484e, subdivision (b) was not affected by section 490.2, subdivision (a) because Proposition 47 was not intended to apply to the access card theft crime covered in section 484e, subdivision (b). We agree with the Attorney General.

First, section 484e is not included in the list of statutes defining felony offenses that qualify for redesignation as misdemeanors. When interpreting a statute, "'we begin with the plain, commonsense meaning of the language used by the Legislature. [Citation.] If the language is unambiguous, the plain meaning controls.'" (*People v. Leiva* (2013) 56 Cal.4th 498, 506.)

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[2] Subdivisions (a), (c), and (d) of section 484e provide: "(a) Every person who, with intent to defraud, sells, transfers, or conveys, an access card, without the cardholder's or issuer's consent, is guilty of grand theft. [¶] . . . [¶] (c) Every person who, with the intent to defraud, acquires or retains possession of an access card without the cardholder's or issuer's consent, with intent to use, sell, or transfer it to a person other than the cardholder or issuer is guilty of petty theft. [¶] (d) Every person who acquires or retains possession of access card account information with respect to an access card validly issued to another person, without the cardholder's or issuer's consent, with the intent to use it fraudulently, is guilty of grand theft."

Second, it is not reasonable to interpret section 484e in such a way that it could be within section 490.2, subdivision (a). In distinguishing between grand theft and petty theft, section 490.2 focuses on the monetary value of the property taken. It expressly references section 487, which states that grand theft is committed "[w]hen the money, labor, or real or personal property taken is of a value exceeding nine hundred fifty dollars ($950)." (§ 487, subd. (a).)

Although section 490.2, subdivision (a) purports to apply to all provisions defining grand theft, it mentions only section 487. Sections 490.2, subdivision (a), and 487, subdivision (a) are similar in that they refer specifically to the value of the "money, labor, or real or personal property" obtained by the theft. (§ 487, subd. (a); see § 490.2, subd. (a).) In other words, both statutes presume a loss to the victim, which can be quantified to assess whether the value of the money, labor, or property taken exceeds the $950 threshold. Section 484e, subdivision (b), however, does not contemplate such a loss.

The elements of a section 484e, subdivision (b) offense are (1) the acquisition of access cards belonging to four or more people (2) that the defendant knew or should have known (3) were taken or retained in violation of section 484e, subdivision (a), (c), or (d). A violation of those subdivisions does not require that anyone actually be defrauded or suffer a loss due to the defendant's acts. (*People v. Molina* (2004) 120 Cal.App.4th 507, 517.) In enacting section 484e, the Legislature specifically determined that certain acts would constitute grand theft despite the fact the value of the item taken did not exceed $950; in some cases, the replacement value of the item taken, such as an access card, is negligible at best.

Finally, defendant argues that the trial court should not have summarily denied his petition under section 1170.18 in the absence of evidence that the value of the stolen access cards exceeded $950. However, defendant bore the burden of establishing eligibility for relief under section 1170.18. (*People v. Sherow* (2015) 239 Cal.App.4th

875, 879-880.) Therefore, any failure by defendant to prove he came within the statute also precludes defendant from obtaining relief.

DISPOSITION

The postjudgment order is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

BEDSWORTH, J.